76-1045

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

ARTHUR DWYER, LORINE L. HARDING, CLINTON CROSBY, GEORGE WALECKI, WALTER KRZYZKOWSKI, FRANCIS BURANT, RAYMOND SCHNEIDER, GILBERT KONTOWICZ, PERRY A. LEE, FLOYD KLAMERT, DONALD WOJCINSKI, CLARENCE KITCHEN, ROBERT J. SURDYK, JAMES S. DINNEEN, RICHARD W. DANIELSKI, GREGORY KONKEL, VICTOR RUKA, EDWARD WYSOCKI, HAROLD D. SEVERINSEN, DONALD LEIGHTON, JOHN F. SMITH, RUSSELL J. TESSMER, RAYMOND SPRAITZ, WILLIAM HOLDER, HAROLD F. ARNDT, GORDON THOMAS, ALVIN CICHY, FRANK JALOWIEC, CLARENCE KUBITSKI, JOHN G. BARANIAK, JOSEPH BELANGER, JR., LOYD H. MAUL and WALTER E. SZALEWSKI, on behalf of themselves as individuals and on behalf of all others similarly situated,

Petitioners,

v.

CLIMATROL INDUSTRIES, INC., a Foreign Corporation, and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (U.A.W.) and ITS LOCAL NO. 409

Petition for a Writ of Ceritorari to the United States Court of Appeals for the Seventh Circuit

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CASE CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

ARTHUR DWYER, LORINE L. HARDING, CLINTON CROSBY, GEORGE WALECKI, WALTER KRZYZKOWSKI, FRANCIS BURANT, RAYMOND SCHNEIDER, GILBERT KONTOWICZ, PERRY A. LEE, FLOYD KLAMERT, DONALD WOJCINSKI, CLARENCE KITCHEN, ROBERT J. SURDYK, JAMES S. DINNEEN, RICHARD W. DANIELSKI, GREGORY KONKEL, VICTOR RUKA, EDWARD WYSOCKI, HAROLD D. SEVERINSEN, DONALD LEIGHTON, JOHN F. SMITH, RUSSELL J. TESSMER, RAYMOND SPRAITZ, WILLIAM HOLDER, HAROLD F. ARNDT, GORDON THOMAS, ALVIN CICHY, FRANK JALOWIEC, CLARENCE KUBITSKI, JOHN G. BARANIAK, JOSEPH BELANGER, JR., LOYD H. MAUL and WALTER E. SZALEWSKI, on behalf of themselves as individuals and on behalf of all others similarly situated,

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Petition for a Writ of Ceritorari to the United States Court of Appeals for the Seventh Circuit

The petitioners, Arthur Dwyer, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 1, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and appears at Appendix A, infra, pp. 101-109. The opinion of the District Court for the Eastern District of Wisconsin appears at Appendix B, infra, pp. 110-113, and is reported at 403 F. Supp. 683. The Decision and Order of the Federal District Court denying the respondents' motion to dismiss petitioners' Complaint dated the 4th day of February, 1975, appears at Appendix C, infra, pp. 114-119. The opinion of the United States District Court for the Eastern District of Michigan in the case of *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Plaintiff, v. The H.K. Porter Company, Defendant,* Civil Action No. 4-72963 entered under date of November 8, 1976, by the Hon. John Feikens is unreported and appears in Appendix D, infra, pp. 120-127.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 1, 1976. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. §1954(1).

QUESTIONS PRESENTED

1. Whether the plaintiff employees of the Company had a vested property interest in the pension plan agreement of March 1, 1970, which may not be terminated without their consent.

2. Whether the Company and the Union are estopped from terminating the pension benefits.

3. Whether the Union breached its duty of fair representation by agreeing to the closedown agreement.

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

The petitioners are former employees of the respondent Climatrol Industries, Inc., and its successor in interest, Fedders Corporation, and former members of the respondent UAW unions. On March 1, 1970, Climatrol and the unions entered into a collective bargaining agreement and a pension plan agreement, which agreement created a vested deferred retirement benefit for employees who rendered ten years of continuous service and attained the age of 40 years. Subsequently, Fedders Corporation became the successor employer of the petitioners and decided to close its Milwaukee plant. On December 15, 1971, a Plant Closedown Agreement was executed by Fedders Corporation, and the unions, which effectively terminated petitioners' pension rights, without their consent and without the petitioners' being permitted to vote on its ratification. Article 5.01 of the Plant Closedown Agreement purported to amend Section 9.01 of the Pension Plan Agreement as follows:

> "9.01. The Company will contribute not later than February 15, 1972, $160,000 to the Trust Fund, and upon payment of such amount, the Company shall have no further funding obligation under the Plan."

Section 9.01 of the Pension Plan Agreement actually provided for Company contributions to the Trust Fund not less than annually of amounts required to meet the normal cost of the Pension Plan, plus the amount

required to amortize the unfunded accrued liabilities from 1962 on a level basis over a period of not more than 30 years as determined by the Actuary of the Plan. Accordingly, the employer's obligation to fund the Pension Plan had no direct relationship to employee hours worked, but rather was to be determined actuarially.

The District Court rendered Summary Judgment in favor of the respondents essentially on the basis that Section 12.01 of the Pension Plan Agreement which states:

> "The Plan may be modified, altered or amended upon mutual agreement of the Company and the Unions."

permitted the termination of plaintiffs' pension rights. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Directly Conflicts With The Principles Enunciated In This Court's Holding In The *Burley v. Elgin* Cases.

In *Burley v. Elgin, J. & E. Ry. Co.*, 325 U.S. 711, 65 S.Ct. 1282 (1945) and *Burley v. Elgin, J. & E. Ry. Co.*, 327 U.S. 661, 66 S.Ct. 721 (1946), the Supreme Court held that a union has no authority on behalf of its membership to bargain away vested or accrued rights. Construing the Supreme Court's *Burley* decision in another context, the United States District Court for Minnesota stated in the case of *Hauser v. Farwell,*

Ozmun, Kirk & Company, 299 F. Supp. 387 (1969) at page 23 thereof as follows:

> "A union may bargain as to prospective matters such as seniority rights, future conditions of employment, etc., it cannot bargain away the accrued or vested rights of its members. So without explicit authority or a power of attorney from the individual members, the union in this case could not bargain away the vested rights of its membership, including plaintiffs' vested rights."

Yet the respondents contended, and the courts below held, that language contained in Section 12.01 of the Pension Plan Agreement which states:

> "The Plan may be modified, altered, or amended upon mutual agreement of the Company and the Union"

authorizes the divestment of petitioners' pension rights. By implication the courts below also held that the satisfaction by the petitioners of the requisite ten-years' continuous service and attainment of age forty conferred some sort of vesting on the petitioners to a pension which nobody had the duty to pay for. It is noteworthy that no express termination clause appears in any of the documents before the courts below, and that no case was cited by which a vested pension right was terminated by means of an amendment.

Reference to the dictionary for the meanings of the words 'amend,' 'modify' or 'alter' nowhere suggests a meaning compatible with terminate.

The review of every case in this area of the law wherein courts considered the issue of what parties' rights should be favored finds every court in virtual unanimity in holding that pension plans should be

liberally construed in favor of the pensioner. But the courts below construed the Climatrol pension plans liberally in favor of the unions.

II. The Position Taken In The Courts Below By Climatrol And The UAW Directly Contradicted The Position Taken By The UAW In The Case Of *UAW v. H.K. Porter Co.* Decided November 8, 1976, Which Appears In Appendix D.

Throughout the course of this case the respondents argued to the courts below that Article 13 of the Pension Plan which set up priority for the payout of funds in the event of discontinuance of the plan supported their construction of the Pension Plan and collective bargaining agreements which permitted termination of vested rights by amendment. In the *Porter* case, supra, the UAW argued, and the court ruled, based on a virtually identical Section 13 of the Pension Plan involved therein, as follows:

> "Section 13 is intended only to govern several unusual situations: If, for example, the assets in the fund are insufficient and defendant is bankrupt, section 13 would determine the distribution of assets. Similarly, if defendant has in fact made sufficient contributions to the fund which should have met all obligations under the Plan, but the fund is depleted through trustee mismanagement or otherwise, section 13 would determine the distribution of assets. Section 13(e) would also determine the distribution of any fund surplus upon termination of the Plan. Section 13 is not intended to negate the guarantee language found elsewhere in the Plan."

The advancement of contradictory legal arguments by the UAW in two different Federal circuits, albeit successfully in each circuit, clearly evidences adherence to the "sporting theory" of litigation. One may realize the deleterious effect the UAW's cynical approach to petitioners' pension rights has had on the attitude of the petitioners toward the concept of justice in these United States.

III. The Rulings Of The Courts Below Are Clearly Erroneous And Impair The Administration Of Justice.

The courts below ruled that petitioners had no vested pension rights. This ruling was made in the face of the following language contained in the Pension Plan:

"4.07 *Vested Deferred Retirement.*

(a) An employee who after December 1, 1957 has completed 10 years of Credited Service and whose employment with the Company is terminated on or after attainment of age 40, under circumstances not entitling him to any other Retirement Benefit under the Plan, shall become eligible on attainment of age 65 for a Vested Deferred Retirement Benefit as provided in Section 5.04 if he makes written application therefor not earlier than 3 months prior to attainment of age 65, or such Employee may elect, in lieu thereof, to become eligible for an Early Vested Deferred Retirement Benefit but such election shall be available only if made on or after August 1, 1962 and on or after attainment of age 60 and prior to attainment of age 65."

Such a ruling is absurd on its face.

CONCLUSION

For the reasons stated, this Court should summarily reverse the decision of the Court below. Summary reversal is appropriate in this case. It is consistent with this Court's practice in cases not only where the law is settled by a prior decision (e.g. *Elgin v. Burley* 327 U.S. 661, 66 S.Ct. 721 (1946)), but also where the action of the lower court was clearly improper.

Respectfully submitted,

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January 27, 1977

APPENDIX

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

No. 75-2119

ARTHUR DWYER, et al.,
Plaintiffs-Appellants,

v.

CLIMATROL INDUSTRIES, INC., INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), and ITS LOCAL 409,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 73-C-201 — **Myron L. Gordon,** *Judge.*

ARGUED SEPTEMBER 28, 1976 — DECIDED NOVEMBER 1, 1976

Before HASTINGS, *Senior Circuit Judge,* TONE and BAUER, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* We are concerned here primarily with the validity of a plant closedown agreement and its relationship to a relevant collective bargaining agreement and its kindred pension plan agreement. The federal district court/[1] granted the

/[1]The United States District Court for the Eastern District of Wisconsin, the Honorable Myron L. Gordon, Judge, presiding.

motions of the defendant Company and defendant Unions for summary judgment and entered judgment thereon dismissing the plaintiffs' action. Plaintiffs appeal. We affirm.

The underlying cause of action was brought pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185 (a) (1970). Plaintiffs were Arthur Dwyer and 35 other former employees of Climatrol Industries, Inc. (Climatrol), all of whom were former members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 409 (together referred to as the defendant Unions)./[2] Named as defendants were Climatrol and the defendant Unions.

In their complaint plaintiffs charged a breach of the collective bargaining agreement and the subject pension plan agreement executed March 1, 1970, between Climatrol and the defendant Unions, covering employees at Climatrol's Milwaukee, Wisconsin, facility, and sought to hold defendants liable for the amount required to fully fund the pension plan agreement.

On December 1, 1970, Fedders Corporation, a New York corporation, became the successor in interest of Climatrol and thereby became bound by the March 1, 1970, collective bargaining and pension plan agreements executed by Climatrol. Despite strong pressure from the defendant Unions, Fedders announced on June 29, 1971, its final decision to close its Milwaukee plant.

/[2]Plaintiffs sought to maintain this action as a class action, pursuant to Rule 23, Federal Rules of Civil Procedure, but the district court denied such motion, holding that "the named plaintiffs may seek relief only on behalf of themselves." This denial is not an issue before us on this appeal.

As early as June 30, 1971, the defendant Unions began negotiations with Fedders on the impact of the plant closing. A Union proposed closedown agreement demanded increases of contractual benefits, and major increases in the area of pensions, insurance and severance. On October 8, 1971, Fedders refused to accept the tendered plan, and after a month's impasse, proposed a counteroffer, with actuarial figures and bids from insurance companies on annuity contracts. Upon mature consideration and recommendation by the elected bargaining committee of Local 409, the UAW joined in accepting Fedders' proposed closedown agreement. The subject closedown agreement was duly executed December 15, 1971, by Local 409, the UAW and Fedders.

Certain provisions of the pension plan agreement are critical to the determination of the subject matter of this litigation — the closedown agreement.

Article XII of the pension plan agreement provides:

> "Amendment and Duration of the Plan
>
> 12.01 The Plan may be modified, altered or amended upon mutual agreement of the Company and the Union."

Under Section 12.03, the pension plan agreement was to remain in full force and effect until March 1, 1973, when it would be proper subject matter for the next collective bargaining negotiations.

Article V. Section 5.01, of the closedown agreement amended the terms of Section 9.01 of the pension plan agreement, as follows:

> "9.01 The Company will contribute, not later than February 15, 1972, $160,000 to the Trust Fund, and upon payment of such amount, the Company

shall have no further funding obligation under the Plan."

Fedders paid the $160,000 into the Trust Fund and considered its obligation under the pension plan fully satisfied. The defendant Unions agreed.

It is relevant to note here that Fedders and the defendant Unions in no way modified the provisions of Section 13.01 of the pension plan, which section defines how funds in the Trust Fund of the plan should be allocated upon termination of the plan. The benefit provisions of the pension plan were not altered. The $160,000 additional contribution to the Trust Fund by Fedders was allocated in accordance with the pre-existing allocation formula.

The issues raised on this appeal seem to be those in fact which were considered by the district court in its well-reasoned opinion, reported as *Dwyer v. Climatrol Industries, Inc.*, E.D. Wis., 403 F. Supp. 683 (1975). Such issues may be stated as:

1. Whether the plaintiff employees of the Company had a *vested property interest* in the pension plan agreement of March 1, 1970, which may not be terminated without their consent.

2. Whether the Company and the Union are *estopped* from terminating the pension benefits.

3. Whether the Union breached its duty of *fair representation* by agreeing to the closedown agreement.

1. VESTED PROPERTY INTEREST

It seems to be conceded that a union has no authority on behalf of its membership to bargain away vested or accrued rights. The key question here, of

course, becomes whether plaintiffs in fact or in law had any vested rights which were bargained away by the defendant Unions, and, if so, how did such rights become vested.

At the outset, it seems relevant to notice again the express language of Section 12.01 of the pension plan agreement, *supra,* which states the plan "may be modified, altered or amended upon mutual agreement of the Company and the Union." Did the defendant Unions have the legal capacity to change the pension plan agreement as was done through Article V, Section 5.01, of the closedown agreement in amending Section 9.01 of the pension plan agreement, *supra*?

It appears that such legal capacity did exist, in light of our language in *Waters v. Wisconsin Steel Works of International Harvester Co.*, 7 Cir., 427 F. 2d 476 (1970), *cert. denied,* 400 U.S. 911. There, in addressing the collective bargaining legitimacy, we stated: "Since parties to a labor contract are always free to amend their agreements, we do not see how an amendment through the ordinary processes of collective bargaining can be considered a breach of contract." *Id.* at 489.

Plaintiffs argue that this cannot be applied to their *vested rights,* relying principally on *Hauser v. Farwell, Ozmun, Kirk & Co.*, D.C. Minn., 299 F. Supp. 387 (1969). This case did not stand for the proposition that funds became vested according to the existing allocation formula, and that once the decision had been made to terminate the pension plan, the union lacked capacity to negotiate reallocation of those remaining funds. In *Hauser,* the employer and the union were attempting to modify the allocation of *funds previously contributed to*

the pension plan, and accordingly were no longer subject to collective bargaining by the union.

By contrast, however, in the case at bar, the closedown agreement affected only *future* contributions to the pension plan, a subject over which the defendant Unions, as the exclusive bargaining representative of the employees involved, had complete and sole authority to negotiate. Section 9(a), National Labor Relations Act, as amended, 29 U.S.C. § 159(a)./[3]

We agree with the district court that the plaintiffs had no vested interest in this pension program. The court found that plaintiffs' rights under the pension plan agreement were subject to the terms of the contract which provided for the right to modify. Having reserved such right to modify, the contracting parties could do so without the express consent of those who might otherwise benefit therefrom. Further, the collective bargaining agreement here provides for a plant closing. *Dwyer,* 403 F. Supp. at 685.

In light of the foregoing, we hold that plaintiffs did not have an unalterable vested interest in the pension plan agreement.

2. ESTOPPEL

In reference to plaintiffs' second defense of estoppel, we confess to finding such defense at best to be obscure.

/[3]29 U.S.C. § 159(a) provides in relevant part:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment ***."

It seems to rest upon plaintiffs' contention in their main brief, page 27, that "the plaintiffs contend that by virtue of their past service to their employer, their employer is estopped from denying its obligation to fund the pension plan these employees were promised." The preceding parts of the brief quoted seem to rely upon a "Vested Deferred Pension Benefit," etc.

We do not find that the district court specifically addressed itself to this issue. The defendants apparently do not accept this contention as a legitimate issue.

Having carefully read the various contentions of all parties, we can only conclude that there can be no liability on the defendants for failing to secure a contract right which the plaintiffs never had.

We hold that defendants were not estopped from denying their obligations to fund the pension plan. One cannot alter the distribution priorities provided for termination. The priorities in the pension plan agreement were faithfully and completely followed.

3. FAIR REPRESENTATION

Finally, plaintiffs contend that the defendant Unions breached their duty of fair representation by agreeing to the closedown agreement.

The law seems to be well established in setting the proper standards which govern a union's duty of fair representation as the exclusive bargaining representative of its members.

In *Vaca v. Sipes,* 386 U.S. 171, 190, the Court said: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." The Court also cited

and relied upon *Ford Motor Co. v. Huffman,* 345 U.S. 330, when it said that as such exclusive "bargaining representative *** the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining *** and in its enforcement of the resulting bargaining agreement, see *Humphrey v. Moore,* 375 U.S. 335." *Vaca,* 386 U.S. at 177. The Court went on to say that "[u]nder this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Humphrey v. Moore,* 375 U.S. at 342." *Vaca* at 177.

In *Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971), the Court said, at 299 citing *Humphrey v. Moore* and *Vaca v. Sipes, supra:* "For such a claim [breach of duty of fair representation] to be made out, Lockridge must have proved 'arbitrary or bad faith conduct on the part of the Union.' There must be 'substantial evidence of fraud, deceitful action or dishonest conduct.'" Further, that whether "these requisite elements have been proved is a matter of federal law." *Lockridge,* 403 U.S. at 299.

Finally, our court, speaking through our Brother Cummings, in *Cannon v. Consolidated Freightways Corp.,* 7 Cir., 524 F. 2d 290, 293 (1975), recognized the standards of the statutory duty of fair representation articulated in *Vaca v. Sipes* and *Motor Coach Employees v. Lockridge, supra.* It noted the further caveat that "proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation." *Id.* at 294.

The record in this case, including the affidavits on file, clearly demonstrate to us that the defendant Unions engaged in fair and extensive bargaining in order to meet the problems presented by the Company's announced intention that it would close its plant in Milwaukee.

Relying on the standard of conduct required of a union in the cases hereinabove set out, we hold that the district court did not err in its holding in this respect in favor of the defendant Unions. Fair representation in all respects was clearly established.

In sum, we have concluded and now hold that, under the circumstances and record present here, the judgment of the district court, granting the defendants' motions for summary judgment and dismissing the plaintiffs' action, should be and the same is now affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

DECISION AND ORDER
(Formal Parts Omitted)
Filed October 6, 1975

DECISION AND ORDER

The defendants have moved for summary judgment. The plaintiffs have moved to add Fedders Corporation as a party defendant and also to have a preliminary determination of law regarding the "doctrine of virtual representation." In view of my finding that the motions for summary judgment submitted by the defendants must be granted, there is no occasion for my resolving the plaintiffs' applications.

The nature of this action was considered by the court in a memorandum dated February 4, 1975, at which time the court considered the motion for dismissal filed by the defendant union as well as other motions. No useful purpose would be served by my repeating here the analysis of the complaint contained in the February 4, 1975, decision.

In connection with the motions for summary judgment, the parties have submitted a substantial amount of material, much of it uncontested. The court now has before it not only the contracts in question but also many meaningful affidavits. A consideration of all these materials persuades me that no substantial issues of fact remain in dispute. Only issues of law remain, and they are capable of resolution upon the records and files presently before the court.

A "Plant Closedown Agreement" was signed between Fedders and the union on December 15, 1971. It is my conclusion that such closedown agreement does not constitute a violation of either the collective bargaining agreement or the pension plan agreement. The latter contract, which was signed on March 1, 1970, contains the following provision (section 12.01):

> "The Plan may be modified, altered or amended upon mutual agreement of the Company and the Union."

Pursuant to that authorization, an amendment of section 9.01 was consummated on December 15, 1971; it provided that the company would contribute $160,000 to the pension fund, and upon such payment, it would have "no further funding obligation under the Plan." Thus, when the $160,000 was paid into the trust fund, the financial responsibility of the employer was contractually satisfied.

The plaintiffs urge that the closedown agreement was ineffective because the unions were without legal capacity to negotiate away the plaintiffs' rights. This contention is effectively negated by the express terms of section 12.01 of the pension plan agreement quoted above. Accordingly, it is my opinion that the closedown agreement is binding upon the plaintiffs as a matter of contract law, and it is unnecessary to determine whether the plaintiffs, as individuals, ratified the amendment. In Waters v. Wisconsin Steel Works of International Harvester Co., 427 F. 2d 476, 489 (7th Cir.), cert. denied, 400 U.S. 911 (1970), the court said:

> "Since parties to a labor contract are always free to amend their agreements, we do not see how an amendment through the ordinary processes of

collective bargaining can be considered a breach of contract." 427 F. 2d at 489.

The plaintiffs urge, however, that they had vested interests in the pension program and that they qualified as third party beneficiaries whose interests could not be altered by the original contracting parties. In my opinion, the case of Thornberry v. MGS Co., Inc., 46 Wis. 2d 592, 176 N.W. 2d 355 (1970), contradicts this contention. The plaintiffs' rights under the contract were subject to the terms of that contract, and one of the provisions explicit therein was the right to modify. Neither Tweeddale v. Tweeddale, 116 Wis. 517, 93 N.W. 440 (1903), nor Estate of Cochrane, 13 Wis. 2d 398, 108 N.W. 529 (1961), is controlling in the case at bar because of the express reservation of the right of the contracting parties to amend it. The contracting parties having reserved such right, they could legally modify the contract without the express consent of those who might otherwise benefit therefrom.

It should be noted that the collective bargaining agreement in this case provided for a plant closing, and that the pension agreement authorized modification, discontinuance or termination. In light of these provisions, the plaintiffs may not be heard to contend that they had a vested benefit which was unalterable.

With reference to the plaintiffs' contention that the defendant unions were guilty of a violation of their duty of fair representation, the affidavits on file demonstrate with clarity that there was no arbitrary or bad faith conduct on the part of the defendant unions. The affidavits further show that the defendant unions engaged in fair and intensive bargaining in order to meet the problems presented by management's

conclusion that it should close its plant in Milwaukee. That the standard of conduct required of a union in Amalgamated Association of St., E.R. & M.C. Emp. v. Lockridge, 403 U.S. 274 (1971), has been met is amply established by the affidavits on file in this case.

CONCLUSION

The plaintiffs did not hold inalienable property rights under the contracts in question, and the defendants are not estopped from denying the plaintiffs' claimed pension benefits. Finally, I am convinced that the record made in this case now clearly establishes that the defendant unions were not guilty of unfair representation. All of the foregoing is amply demonstrated by contracts and affidavits which leave no material facts for trial. Therefore, the court will grant the defendants' motions for summary judgment. It follows that it is unnecessary to add Fedders Corporation as a party defendant since the action against it would be no stronger than that against Climatrol. It also becomes unnecessary for the court to determine whether the so-called "doctrine of virtual representation" may be employed in this case.

Therefore, IT IS ORDERED that the defendants' motions for summary judgment be and hereby are granted.

IT IS ALSO ORDERED that the plaintiffs' action be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this *6th* day of October, 1975.

/s/ Myron L. Gordon
U.S. District Judge

APPENDIX C

DECISION AND ORDER
(Formal Parts Omitted)
Filed February 4, 1975

DECISION and ORDER

The defendant unions, International Union, United Automobile Aerospace Agricultural Implement Workers of America, and its Local no. 409, have moved to dismiss this action pursuant to Rule 12 (b) (6), Federal Rules of Civil Procedure. Also before me is the plaintiffs' motion under Rule 23(c), Federal Rules of Civil Procedure, for an order determining that this suit may be maintained as a class action.

The corporate defendant, Climatrol Industries, Inc. [Climatrol], has not joined in the unions' motion to dismiss, but maintains that the unions are indispensable parties to this action; I need not rule on Climatrol's position in this respect because I conclude that the unions' motion to dismiss should be denied. I further conclude that the plaintiffs' class action motion should be denied.

The complaint alleges that on March 1, 1970, the defendant unions and Climatrol executed a collective bargaining and a pension plan agreement which established "vested" pension benefits for the plaintiffs. Subsequently, on December 15, 1971, Fedders Corporation, a successor employer to Climatrol, and the unions entered into a plant close-down contract. This latter agreement is claimed to have curtailed or eliminated the pension benefits provided by the two March 1, 1970, contracts.

The plaintiffs seek, among other things, to hold the defendants liable for the amount needed fully to fund the pension plan established by the two agreements dated March 1, 1970. Jurisdiction in this court is predicated upon § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185 (a) (1970).

The complaint posits three theories of recovery. The first is that the plant close-down agreement deprived the plaintiffs of "vested" pension rights, thus violating the collective bargaining and pension plan agreements of March 1, 1970, [hereinafter referred to as the "vested rights claim"]. The second theory is that the defendants' conduct, which resulted in the two March 1, 1970, contracts, estops the defendants from denying that the plaintiffs are entitled to the pension benefits set forth in the March 1, 1970, agreements [hereinafter referred to as the "estoppel claim"]. The final theory is that the defendant unions violated their duty of fair representation [hereinafter referred to as the "fair representation claim"].

The defendant unions assert that the complaint is fatally defective because there are no allegations that contractual remedies have been exhausted. While such exhaustion must be alleged as a prerequisite to a suit under § 301(a), in my opinion the efforts described in the complaint are sufficient for purposes of avoiding dismissal.

Paragraph 40(f) of the complaint states:

> "The parties defendant opposing the class have failed and refused to process the plaintiffs' claim by means of arbitration despite due demand therefore [*sic*] by plaintiffs' counsel ...."

When this allegation is viewed in light of the fact that the plaintiffs are alleging wrongful concerted activity on the part of the employer and unions, I believe the exhaustion requirement has been adequately met.

The same conclusion was reached under similar circumstances in Hauser v. Farwell, Ozmun, Kirk & Co., 299 F. Supp. 387 (D. Minn. 1969). In my opinion the reasoning of the *Hauser* court at page 392 is applicable:

> "The court agrees with plaintiffs that they did attempt to seek their contractual remedy, albeit not according to specific procedures of the collective bargaining contract. Also it is clear that formal submission to the grievance procedure was not feasible in light of the community of interest between the employer and the Union."

With respect to the "vested rights claim," the defendants take the position that in a suit under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185 (a), the court must view the complaint "as an attempt to bring a claim against the corporate defendant with an accompanying claim against the defendant Unions for breach of duty of fair representation." The defendants rely upon Vaca v. Sipes, 386 U.S. 171 (1967), and Waters v. Wisconsin Steel Workers of International Harvester Co., 427 F. 2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970), for this proposition.

In my opinion the defendants' reliance upon *Vaca* and *Waters* is misplaced. The nature of the claim against the union in *Vaca* is distinguishable from the "vested rights claim" asserted against the defendant unions in this case. In *Vaca* the Supreme Court observed that

> "the Union played no part in Swift's alleged breach of contract and ... Swift took no part in the Union's alleged breach of duty ...." 386 U.S. at 197 n. 18.

From this the Court concluded that "joint liability for either wrongs would be unwarranted." *Id.* The thrust of plaintiffs' "vested rights claim," on the other hand, is that the unions and the employer, through the vehicle of the plant close-down agreement, acted together to deprive the plaintiffs of "vested" pension rights guaranteed them in the collective bargaining and pension plan contracts of March 1, 1970. Thus, because concerted activity on the part of the unions and the employer is alleged *Vaca* does not protect the unions from liability under § 301(a). Furthermore, the seventh circuit in *Waters* recognized that a claim for relief against the union under § 301(a) had been stated by allegations that the union had participated or acquiesced in the employer's wrongful conduct. 427 F. 2d at 490.

I therefore conclude that insofar as the "vested rights claim" of the plaintiffs is premised upon the unions' participation in the plant close-down agreement and upon the unions' alleged lack of the authority to bargain away the plaintiffs' "vested" pension rights, a colorable claim for relief has been stated. See Hauser v. Farwell, Ozmun, Kirk & Co., 299 F. Supp. 387 (D. Minn. 1969).

The defendant unions' challenge to the plaintiffs' "estoppel claim" depended upon the plaintiffs' failure to assert a valid claim under § 301 of the Labor Management Relations Act. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (dismissal of federal claims before trial warrants dismissal of pendent state

claims as well). Because I have determined that the "vested rights claim" is adequate to withstand the unions' motion to dismiss, it is appropriate to retain jurisdiction over the otherwise unassailed "estoppel claim."

The defendant unions also urge that the plaintiffs have failed to state a claim for breach of the duty of fair representation. In my opinion the complaint is sufficient in this regard.

The defendants' attack upon the plaintiffs' fair representation claim is two-pronged. First, the defendants assert that the plaintiffs cannot logically assume that the union had authority to bargain away the plaintiffs' asserted pension rights while alleging that the unions' conduct in connection with the agreement which terminated those rights violated the unions' duty fairly to represent the plaintiffs. Secondly, the defendants argue that no facts have been alleged which can support the conclusion that the duty of fair representation has been violated.

To state a claim for a breach of the duty of fair representation, the plaintiff must allege facts that show the "union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967). The heart of the plaintiffs' fair representation claim is that they were deprived of the right to vote upon the ratification of the plant close-down agreement, a matter which affected the plaintiffs' economic interests. A reading of the complaint indicates that the economic interests involved were allegedly the pension benefits provided by the two agreements dated March 1, 1970. In my opinion proof of such facts would support the fair

representation claim. Furthermore, such an attack on the unions' conduct during the employee ratification process can logically be sustained regardless of the unions' power to bargain with respect to any subject matter affected by the plant close-down agreement.

Although the complaint is sufficient to survive the defendant unions' attack upon it, the plaintiffs' class action motion must be denied. Rule 23 (a), Federal Rules of Civil Procedure, lists the requisite elements for the maintenance of any class action. Under Rule 23 (a) (1), it is the plaintiffs' burden to demonstrate that joinder of all members of the alleged class is impracticable. E.g. Neddo v. Housing Authority of the City of Milwaukee, 335 F. Supp. 1397, 1401 (E.D. Wis. 1971). In my opinion the plaintiffs' mere recitation of the language of the rule, absent the presentation of the basic facts as to why joinder is impracticable, constitutes a failure to meet the movants' burden under Rule 23. See Gillibeau v. City of Richmond, 417 F. 2d 426, 432 (9th Cir. 1969) (dictum); Cash v. Swifton Land Corp., 434 F. 2d 569, 571 (6th Cir. 1970). See also Neddo v. Housing Authority of the City of Milwaukee, *supra*. It follows that the named plaintiffs may seek relief only on behalf of themselves.

Therefore, IT IS ORDERED that the defendant unions' motion to dismiss the complaint be and hereby is denied.

IT IS ALSO ORDERED that the plaintiffs' class action motion be and hereby is denied.

Dated at Milwaukee, Wisconsin, this *4* day of February, 1975.

/s/ Myron L. Gordon
U.S. District Judge

APPENDIX D

MEMORANDUM OPINION
(Formal Parts Omitted)
Filed November 8, 1976

Defendant, the H. K. Porter Company, Inc., a Delaware corporation, entered into a collective bargaining agreement with plaintiff, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), in July 1969. This collective bargaining agreement, like its predecessor agreements, covered the employees at defendant's plant in Riverside, New Jersey, and included, by separate document, provisions for retirement pensions.

In December 1970, defendant closed the Riverside factory. On January 1, 1974, defendant unilaterally terminated the Pension Plan provided for by the 1969 collective bargaining agreement./[1] That the defendant had a right so to terminate the Plan is undisputed. However, the effect of this termination is now the subject matter of Count I of this action, brought by plaintiff against defendant under § 301 of the Labor Management Relations Act (29 U.S.C. § 185). The matter is presented on cross-motions for summary judgment; the issue is defendant's liability under the Plan.

From 1955 through 1974, defendant provided for employee pensions by funding the Pension Plan with the H. K. Porter Company, Inc. Common Pension Trust. During the first years of the Plan's existence a terminal

[1]The relevant portions of the Plan, sections 3, 5, 6, 10, 11, 12, 13, 13A and 15 are included in an appendix.

funding method required defendant to make contributions actuarially determined to be sufficient to pay the monthly pensions due the retired employees. After 1969, the company made annual contributions for each eligible employee. An independent firm of actuaries determined the amount to be contributed by taking into consideration (1) the future pensions owed each covered employee based on his current years' service, (2) the unfunded past service liability (created whenever pension benefit levels were increased) as amortized over a period of years, and (3) the interest rate which it was assumed the fund would earn.

When defendant terminated the Plan in 1974, the fund contained $503,774.00. As of the date of termination approximately 112 employees were of retirement age or had already retired and were eligible for pensions in the estimated amount of $1,160,000.00. An additional 128 employees had vested rights to future benefits in the approximate amount of $869,000.00. The discrepancy between the money in the fund and the accrued pension obligations is basically caused by the unfunded past service liability.

Plaintiff maintains that in the 1969 Plan defendant guaranteed payment of all accrued pension benefits to employees with vested pension rights. Although the factory closing prevented the further vesting of any pension rights and ended the accrual of pension benefits owed, plaintiff argues that when defendant terminated the Plan it was then obligated to make immediate payment of all its pension obligations.

Defendant contends that its only obligation under the Plan is to make the actuarially determined annual contributions to the fund and that upon termination of

the Plan, the money in the fund must be allocated to provide pensions in the order of priority prescribed by section 13. Accordingly, defendant has used the $503,774.00 in the fund to buy annuities for the 112 retired employees; these annuities are providing a monthly pension for life approximately half of the full benefits defined under section 6 of the Plan. The other 128 employees with vested pension rights have received nothing.

The court concludes that the Plan guarantees full pension benefits to all employees with vested rights. The Plan gives pension rights to employees who have retired at age sixty-two or sixty-five after at least ten years continuous service (section 6) or who are at least fifty years old with twenty years continuous service (section 5) or who are forty years old with fifteen years continuous service when the plant closes (section 13A). Only section 13A explicitly describes the pension rights as vested, but the mandatory nature of the language found in section 6 ("shall be entitled to a monthly pension for life"), and in section 5 ("shall be eligible ... to receive a pension commencing at or after the age of sixty-five") indicates that it is also the intent of these sections to give vested pension rights. A vested right is not contingent on the fulfilling of any condition unless such contingency is expressly stated. *See, e.g., Fisch v. General Motors Corp.*, 169 F. 2d 266, 270 (6th Cir. 1948), *cert. denied,* 335 U.S. 902 (1949):

> "It is said by Mr. Justice Cooley [Cooley's Constitutional Limitations, 8th ed.] that 'rights are vested in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event ...' "

Nothing in this contract materially limits employees' rights to vested pensions or defendant's obligation to pay them even though such a limitation could easily have been included.

Under the agreement defendant's duty was "to provide for the pensions under the Plan by funding the Plan" (section 10) through deposits of "sufficient [monies] to meet all obligations under the Plan" (section 11). Defendant's obligations under the Plan are to pay each employee with vested pension rights monthly pensions for life upon retirement in an amount determined by multiplying the applicable benefit level times the employee's years of service (*see* section 6). This promise is clear; its meaning is specific. Section 11 provides that defendant's actuary must annually certify that the funds deposited are sufficient to fulfill this promise. The closing of the plant and the termination of the Plan do not relieve defendant of these contractual responsibilities, nor does the insufficiency in the pension trust fund relieve defendant of its obligation; it must continue to pay all retired employees full pension benefits, and it must prepare to pay those employees with vested pension rights their earned benefits when they reach retirement age.

In support of its contention that pensions are not guaranteed under the Plan defendant relies on section 13 which establishes an order of priority for "the interest of said Plan in the H.K. Porter Company, Inc. Common Pension Trust [to be] used for the benefit of employees" in the event of termination of the Plan. This

section implies, defendant argues, that upon termination of the Plan, only the assets in the fund are guaranteed to the employees with vested pension rights. Defendant questions the function or need of an order of priority if pension rights are fully guaranteed.

Section 13 is intended only to govern several unusual situations: If, for example, the assets in the fund are insufficient and defendant is bankrupt, section 13 would determine the distribution of assets. Similarly, if defendant has in fact made sufficient contributions to the fund which should have met all obligations under the Plan, but the fund is depleted through trustee mismanagement or otherwise, section 13 would determine the distribution of assets. Section 13(e) would also determine the distribution of any fund surplus upon termination of the Plan. Section 13 is not intended to negate the guarantee language found elsewhere in the Plan. (See discussion *infra*.)

Defendant claims that its liability is expressly limited to making the actuarially determined annual contributions to the fund. In asserting this defendant relies first on section 10 which provides that it "shall provide for the pensions under the Plan ... in accordance with the terms and conditions of [the] Common Pension Trust." Sections 5.2 and 6.2[2] of the

[2] *Section 5.2.* The participation hereunder of any Participating Plan may be terminated by the company maintaining such plan at any time. In such event the Trustees shall transfer to a trustee, insurance company or other institution designated by such company an amount equal to the value of the entire interest of such Plan in the Trust Fund. The Trustees may in their discretion make such transfer in cash, in kind, or partly in each and the receipt of such trustee, insurance company or other institution therefor shall constitute a full and complete discharge of all liability of the Trustees with respect to the amounts so transferred.

Common Pension Trust are cited by defendant. Neither section limits defendant's liability in this case. Section 5.2 limits only the liability of the Trustee of the Common Pension Trust. Section 6.2 prohibits all liability except that specifically provided for in the Pension Plan Agreement. It provides that defendant may not be held liable as to any individual beyond the assets of the Common Pension Trust Fund (defined by Section 1.1 as being comprised of the assets of all Participating Plans). Plaintiff's claims may be satisfied without violating the terms and conditions of the Common Pension Trust.

Defendant relies also on Section 15 of the Plan which provides in part, "The Company shall have no liability in respect of pensions or otherwise under the Plan except to make to the H.K. Porter Company, Inc. Common Pension Trust the contributions to provide the pensions specified in the Plan." This section does not support defendant's position. True, defendant's only duty is to make the contributions to provide the pensions specified in the Plan. But the pensions specified in the Plan are guaranteed vested pensions. Nothing in this section or any other section limits

(footnote 2 continued)

Section 6.2. [in part] In no event shall the Trustees, the Pension Board or Committee of any Participating Plan, the Company, its subsidiaries or the officers, directors or shareholders of the Company or its subsidiaries be liable to any person whomsoever under this Agreement beyond the assets of the Trust Fund. No provision of this Agreement or of any Participating Plan and nothing done pursuant to this Agreement or any such Plan shall be held or construed to give any employee or pensioner covered by any such Plan or any spouse, heir at law, estate or beneficiary of any such employee or pensioner rights to any benefits hereunder or under any such Plan or to create a contract or liability against the Company or any subsidiary except as specifically provided herein and in such Plan.

defendant's liability to the assets in the fund at termination date. In view of the guarantee and vesting provisions found in sections 5, 6, 10, 11 and 13A of the Plan any such provision divesting employees of their pension rights would have to be explicit in its terms. *See, e.g., The Northern Cheyenne Tribe v. Northern Cheyenne Defendant Class,* 505 F. 2d 268, 271 (9th Cir. 1974); *see, Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, at n. 20 (1971) ("Under established contract principles, vested retirement rights may not be altered without the pensioner's consent.") Section 15 does not limit liability in the manner defendant asserts.

Although defendant is liable in full for the vested pension benefits, the court holds that defendant may fulfill its obligation by continuing to make contributions to the fund sufficient to pay the monthly pensions owing as they fall due. Section 13 does limit defendant's liability to the making of contributions; no section provides for a lump sum payment upon plant closing or Plan termination. This is not a case for acceleration of damages following an anticipatory breach of contract since defendant did not act in bad faith and defendant has now only a unilateral obligation to pay money in the future. *See, Local 1574, International Association of Machinists and Aerospace Workers v. Gulf & Western Manufacturing Co.,* 417 F. Supp. 191, 201 (S.D. Maine 1976). To the extent, however, that unpaid benefits will have accrued during the period from termination date to date of judgment, defendant shall be liable in a lump sum amount.

For the foregoing reasons, plaintiff's motion for summary judgment as to Count I of the complaint is granted; defendant's motion is denied. An appropriate order may be submitted.

/s/ John Feikens
JOHN FEIKENS
United States District Judge

DATE: NOVEMBER 8, 1976,
Detroit, Michigan.

APPENDIX

AGREEMENT for PENSION PLAN
between THE H.K. PORTER COMPANY, INC., FABRICATED METALS DIVISION, RIVERSIDE WORKS, RIVERSIDE, NEW JERSEY and THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) LOCAL 1295, Dated July 1, 1969.

* * *

"*Section 3. Eligible Employees.* All regularly employed employees on August 3, 1952, are eligible to participate in the Plan, and also employees hired after that date; provided, however, that an employee who is hired after August 3, 1952 and who is over fifty (50) years of age when hired, must attain ten (10) years or more service at age sixty-five (65) in order to be eligible to participate in the Plan.

* * *

"*Section 5. Deferred Pension Plan.* Effective January 24, 1961, the amendment of November 4, 1959 entitled "Deferred Pension Plan" shall be amended to read as follows: Deferred Pension Plan: Any employee, who shall have reached his fiftieth (50) birthday and shall have twenty (20) years or more continuous service, shall be eligible, upon making application therefor in the manner prescribed by the Pension Committee, to receive a pension commencing at or after the age of sixty-five (65). Effective July 1, 1969, provision is also made, that an employee fulfilling the requirements under the Deferred Pension Plan, may take retirement at age sixty-two (62), but will receive accrued benefits reduced to actuarial equivalent from age sixty-five (65).

"*Section 6. Amount of Pension.* Upon actual retirement each employee who hereafter retires and who has at least ten (10) years of continuous service with the Company shall be entitled to receive a monthly pension for life computed on the basis of the following schedule:

a. Those employees retiring prior to July 1, 1970 will receive Three Dollars and Seventy-Five cents ($3.75) multiplied by the number of years of such employee's continuous service with a maximum monthly payment of $131.25.

b. Those employees retiring prior to July 1, 1971 will receive Four Dollars and Twenty-Five cents ($4.25) multiplied by the number of years of such employee's continuous service with a maximum monthly payment of $148.75.

c. Those employees retiring prior to July 1, 1972 will receive Four Dollars and Seventy-Five cents ($4.75) multiplied by the number of years of such employee's continuous service with a maximum monthly payment of $166.25.

Employees who retire during the term of the Contract, expiration date being June 30, 1972, will receive the increased benefits in effect on each anniversary date of the Contract.

Continuous service after normal retirement age shall be included in determining the amount of pension at actual retirement if, but only if, the employee shall have had at least ten (10) years of continuous employment at normal retirement age, but this provision shall not be applicable to employees who were in the employ of the Company on August 3, 1952.

If a participant retires at his normal retirement age, payment of his pension shall commence on that

date; if he retires after his normal retirement date, it shall commence on the first day of the month coinciding with or next following his actual retirement. In either case it shall end with the payment made on the first day of the month in which his death occurs, or in which the death of his beneficiary occurs if he shall have elected a joint survivorship pension and his beneficiary shall survive him.

* * *

"*Section 10. Funding.* The Company shall provide for the pension under the Plan by funding the Plan with the H.K. Porter Company, Inc., Common Pension Trust and in accordance with the terms and conditions of said Common Pension Trust.

"*Section 11. Pension Committee.* To supervise and administer the Plan there shall be a Pension Committee consisting of six persons who shall serve without compensation. Three members of the Committee shall be appointed by the Board of Directors of the Company and the remaining three members shall be appointed by the Union. The appointing authority may at any time remove any member appointed by it and shall fill all vacancies caused by the death, resignation or removal of any of the members appointed by it.

The Committee shall elect its officers and adopt its rules of procedure; it shall keep a written record of its proceedings. It shall meet annually to review the Plan. Special meetings shall be held at the call of any member to consider problems within the jurisdiction o the Committee. At all meetings there shall be three votes for the members appointed by the Board of Directors and three votes for the members appointed by the Union, notwithstanding the fact that one or more members of the Committee may be absent.

The Committee shall determine questions affecting the eligibility of any employee to participate in the Plan or questions concerning the amount of the pension of any employee. If there is a deadlock in the Committee on any such question, it shall be settled under the same procedure as provided in the applicable articles covering grievances in the Collective Bargaining Agreement between the Company and the Union at the present time and from time to time.

At the time of the annual review of the Plan the Company will cause to be furnished to the Pension Committee a statement of the actuary of the H.K. Porter Company, Inc., Common Pension Trust certifying that the funds "deposited" by the Company with said Common Pension Trust are sufficient to meet all obligations under the Plan. At such annual meeting the Pension Committee will make a review of all employees as to age and length of service, and thereafter cause the results of such review to be submitted to the actuary of said Common Pension Trust for use in preparing its certificate for the next annual meeting. A report will be made by the respective members to those whom they represent.

"*Section 12. Amendment or Termination.* Except as provided in Section 16, the Pension Agreement shall not be altered, amended or terminated prior to the day in 1972 when the Collective Bargaining Agreement between the Company and the Union then in effect shall terminate. On and after that date either party may terminate the agreement by giving to the other party written notice stating the date of termination. Also on or after that date the parties may by mutual agreement in writing alter or amend the agreement, provided that no amendment shall be effective unless the Plan as so amended shall be for the

exclusive benefit of the participants; no change may be made in the Plan which shall vest in the Company, directly or indirectly, any interest or ownership in any of the present or subsequent funds of the trust. Nothing in this section shall operate to prevent an increase in benefits if the growth of the fund shall warrant such an increase.

"*Section 13. Distribution on Termination.* In the event of termination of the Plan, the interest of said Plan in the H.K. Porter Company, Inc., Common Pension Trust shall be used for the benefit of employees in the following order of priority:

a. To provide the pensions then payable under the Plan to all employees who have heretofore retired.

b. To provide the pensions payable under the Plan to employees then working for the Company who have reached normal retirement age.

c. To provide for employees then working for the Company who have attained age sixty but are not yet sixty-five years of age the pension payable under Section 6 of the Plan based on at least twenty completed years of continuous service to the date of termination.

d. To provide for employees then working for the Company who have attained age fifty but are not yet sixty years of age, the pension payable under Section 6 of the Plan based on at least twenty completed years of continuous service to the date of termination.

e. The remainder of the fund, if any, shall be allocated among all other employees then working for the Company in the proportion which years of continuous service of each employee shall bear to the total years of continuous service of all such employees, etc.

The benefit to which each employee is entitled under the provisions of this section shall be provided in the form of a pension, unless, the amount for any employee shall not be sufficient to provide a pension of at least $10.00 per month, in which case the Company may direct the payment of such benefit to the employee on his retirement in cash or in such installments over a period of years as the Company may deem advisable.

"*Section 13A.* The Company agrees that vested rights shall be given employees in the event of the closing of the Plant as follows:

a. Employee must have minimum of fifteen (15) years seniority and have reached forty (40) years of age.

b. Employee must apply in writing to company a minimum of ninety (90) days before he reaches the age of sixty-five (65).

c. If employee does not apply in writing to Company before reaching the age of seventy (70), he waives his rights to pension benefits.

* * *

"*Section 15. Liability of Company.* The Company shall have no liability in respect of pensions or otherwise under the Plan except to make to the H.K. Porter Company, Inc., Common Pension Trust the contributions to provide the pensions specified in the Plan or in any amendment thereto; and the Company shall have no liability in respect of the funds paid over to the H.K. Porter Company, Inc., Common Pension Trust."

* * *

Note: Minor typographical errors in original text — Agreement for Pension Plan, etc., Exhibit A, have been corrected.

No. 76-1045

In the Supreme Court of the United States

OCTOBER TERM, 1976

ARTHUR DWYER, et al.,

Petitioners,

vs.

CLIMATROL INDUSTRIES, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT CLIMATROL INDUSTRIES, INC. IN OPPOSITION TO PETITION

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BRIEF FOR RESPONDENT CLIMATROL INDUSTRIES, INC. IN OPPOSITION TO PETITION

QUESTIONS PRESENTED

The questions Respondent Climatrol Industries, Inc. believes dispositive of this case are as follows:

1. Did Defendant Unions have authority to negotiate the December 15, 1971 plant closedown agreement, including the amendments to the pension plan agreement?

2. If Defendant Unions lacked authority to negotiate the plant closedown agreement, did the individual Petitioners ratify that agreement?

3. In the absence of the amendments contained in the plant closedown agreement, did the pension plan agreement require Respondent Climatrol Industries, Inc. to fully fund the pension plan upon its termination?

STATEMENT OF THE CASE

On March 1, 1970, Climatrol Industries, Inc. (hereinafter also referred to as "Climatrol") and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), and its Local No. 409 (hereinafter referred to as "Defendant Unions") entered into a collective bargaining agreement and pension plan agreement covering employees employed by Climatrol at its Milwaukee, Wisconsin facility. On December 1, 1970, Fedders Corporation, a New York corporation, acquired all the assets of Climatrol and assumed all the obligations of Climatrol under the March 1, 1970 collective bargaining agreement and pension plan agreement. Defendant Unions were advised of and, by their actions and words, agreed to the substitution of Fedders Corporation for Climatrol as "the Company" obligated under the terms of the collective bargaining agreement and pension plan agreement.

On December 15, 1971, Fedders Corporation, as "the Company" then obligated under the terms of the collective bargaining agreement and pension plan agreement, and Defendant Unions, as exclusive bargaining representative of the employees covered by those agreements, including all the Petitioners, negotiated a plant closedown agreement

requiring payment of additional funds by Fedders Corporation to the pension plan Trust Fund, discharging "the Company" from further financial obligation under the pension plan agreement, providing for the subsequent termination of the pension plan agreement and the collective bargaining agreement, and relieving "the Company" of all further obligations and liabilities to Defendant Unions and their members. Fedders Corporation fulfilled all its obligations pursuant to the plant closedown agreement, including the additional payment to the pension plan Trust Fund in the amount of $160,000, and, in accordance with the agreement, closed the plant and terminated the bargaining unit employees.

On April 5, 1973, Petitioners, all former employees of Climatrol and former members of Defendant Unions, brought this action pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), alleging breach of the collective bargaining agreement and pension plan agreement executed March 1, 1970, between Climatrol and Defendant Unions. On October 6, 1975, the United States District Court for the Eastern District of Wisconsin granted the motions of Climatrol and Defendant Unions for summary judgment and entered a judgment dismissing the action on its merits. (Appendix to Petition, pp. 110-113) On November 1, 1976, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court. (Appendix to Petition, pp. 101-109)

ARGUMENT

I.

Defendant Unions had authority pursuant to the terms of the pension plan agreement to negotiate the amendments to that agreement.

Petitioners' fundamental assertion throughout these proceedings has been that Defendant Unions' status as exclusive bargaining representative pursuant to Section 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. §159(a), did not include authority to negotiate the amendments to the pension plan agreement contained in the plant closedown agreement. However, Section 12.01 of the pension plan agreement stated:

> "The Plan may be modified, altered, or amended upon mutual agreement of the Company and the Union."

On the basis of that provision, the Court of Appeals concluded as follows:

> "We agree with the district court that the plaintiffs had no vested interest in this pension program. The court found that plaintiffs' rights under the pension plan agreement were subject to the terms of the contract which provided for the right to modify. Having reserved such right to modify, the contracting parties could do so without the express consent of those who might otherwise benefit therefrom. . . .
>
> "In light of the foregoing, we hold that plaintiffs did not have an unalterable vested interest in the pension plan agreement." (Appendix to Petition, p. 106)

Thus, whether or not Defendant Unions would have had independent statutory authority to negotiate the pension plan amendments, they had such authority pursuant to the terms of the contract which created the benefits in question. Accordingly, the issue here is one of contract rather than statutory interpretation. On that issue, the Court of Appeals, the District Court, and the parties to the contract are all in agreement that Defendant Unions and Fedders Corporation properly adopted the amendments to the pension plan agreement contained in the plant closedown agreement.

II.

There is no conflict between the decisions below and the cases cited by Petitioners.

In support of their petition, Petitioners contend that the decisions below conflict with the holdings of this Court in *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711 (1945), and *Elgin, J. & E. R. Co.* v. *Burley,* 327 U.S 661 (1946), and the application of those opinions in *Hauser* v. *Farwell, Ozmun, Kirk and Company,* 299 F.Supp. 387 (D.C. Minn. 1969). (Petition, pp. 5-6) Each of those decisions dealt with the statutory authority of bargaining representatives to negotiate concerning rights which had accrued to individual employees. In the present action, as previously stated, the applicable agreement was interpreted to preclude any "vested interests," all such interests being subject to amendment by agreement between the Company and Defendant Unions.

Moreover, the amendments in question here did not relate to the use of *funds previously contributed,* but specifically were limited to *future contributions* to the pension plan. As stated by the Court of Appeals,

"In *Hauser,* the employer and the union were attempting to modify the allocation of *funds previously contributed to the pension plan,* and accordingly were no longer subject to collective bargaining by the union.

"By contrast, however, in the case at bar, the closedown agreement affected only *future* contributions to the pension plan, a subject over which the defendant Unions, as the exclusive bargaining representative of the employees involved, had complete and sole authority to negotiate. Section 9(a), National Labor Relations Act, as amended, 29 U.S.C. §159(a)." (Appendix to Petition, pp. 105-106; emphasis in original; footnote omitted)

Finally, in *UAW* v. *H. K. Porter Company* (E.D. Mich. 1976) (Appendix to Petition, pp. 120-127), the court interpreted the pension plan there at issue to require full funding beyond the termination of the plan. In the present case, on the other hand, the pension plan, as amended, specified the additional contribution required of the Company, which amount was fully paid by Fedders Corporation.

III.

Even if Defendant Unions lacked authority to negotiate the plant closedown agreement, full funding of the pension plan would not be required.

The plant closedown agreement dated December 15, 1971, granted certain severance and vacation pay benefits to employees, including Petitioners. Section 3.04 of the agreement further provided as follows:

"Severance allowances and vacation payment made at the time of termination shall be deemed to be payment in full of all obligations on the part of the Company to the Union and the employees."

In accepting such payments, the individual employees, including each of the Petitioners, effectively ratified the action of Defendant Unions in adopting the plant closedown agreement or, at a minimum, accepted such payment as full satisfaction of any claims they might have had against the Company, including claims pursuant to the collective bargaining agreement or pension plan agreement. See *Cohen* v. *Sabin,* 452 Pa. 447, 307 A.2d 845 (1973); *Williston on Contracts,* Third Edition §1838, "Definition of Accord and Satisfaction" (1972).

Furthermore, the only obligation of "the Company" pursuant to the pension plan agreement was that stated in Section 9.01, to contribute annually on the basis of a prescribed formula. Section 9.04 of the agreement stated as follows:

"Deposits by the Company in the Trust Fund of the contributions required under this Article [IX] shall be in complete discharge of the Company's financial obligation under this agreement."

Section 12.03 of the pension plan agreement provided that the plan would remain in effect until March 1, 1973, and Article XIII prescribed the basis upon which assets in the plan's Trust Fund would be allocated upon discontinuance of the plan. Thus, even if the plan had not been amended, Company contributions would have been required only through March 1, 1973.[1] By its own terms, the unamended pension plan agreement did not require full funding. In *Hauser* v. *Farwell, Ozmun, Kirk and Company,* 299 F.

[1] It was this obligation that in part led Fedders Corporation in December 1971 to agree in the plant closedown agreement to make the lump sum contribution of $160,000 to the pension plan Trust Fund.

Supp. 387 (D.C. Minn. 1969), the case relied upon by Petitioners, the court specifically rejected a similar claim for full funding pursuant to the unamended pension plan. 299 F.Supp. at 397.

Thus, even if Defendant Unions lacked authority to negotiate the plant closedown agreement amending the pension plan agreement, Petitioners would not be entitled to the benefits they now claim.

CONCLUSION

For the reasons stated herein, Respondent Climatrol Industries, Inc. requests the Court to deny the petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1045

ARTHUR DWYER, *et al., Petitioners,*

v.

CLIMATROL INDUSTRIES, INC., INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 409, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR UAW AND ITS LOCAL 409

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BRIEF IN OPPOSITION FOR UAW AND ITS LOCAL 409

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 409[1], by counsel, respectfully pray that the Court *deny* the Petition for Writ of Certiorari.

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[1] Hereafter jointly "UAW," unless otherwise indicated.

OPINION BELOW

The opinion below, authored by Judge Hastings, is reported at 544 F. 2d 307 (7th Cir. 1976), *aff'm'g* 403 F. Supp. 683 (ED Wis. 1975).

QUESTION PRESENTED

An employer closes its plant during the term of a collective bargaining agreement. Does the Union breach its duty of fair representation by negotiating a closedown agreement which terminates the Pension Plan and distributes the assets in the manner specified in the Plan?

COUNTERSTATEMENT OF THE CASE

The Seventh Circuit's statement[2] is both succinct and accurate. For convenience, we reprint it:

> On December 1, 1970, Fedders Corporation . . . became the successor in interest of Climatrol and thereby bound by the March 1, 1970, collective bargaining agreements executed by Climatrol. Despite strong pressure from the defendant Unions, Fedders announced on June 29, 1971, its final decision to close its Milwaukee plant.
>
> As early as June 30, 1971, the defendant Unions began negotiating with Fedders on the impact of the plant closing. A Union proposed closedown agreement demanded increases in contractual benefits, and major increases in the area of pensions, insurance and severance. On October 8, 1971, Fedders refused to accept the tendered plan, and after a month's impasse, proposed a counteroffer, with actuarial figures and bids from insurance companies on annuity contracts. Upon mature consideration and recommendation of the elected

[2] 544 F. 2d at 309. Reprinted in the Appendix to the Petition at App. 102-104.

> bargaining committee of Local 409, the UAW joined in accepting Fedders' proposed closedown agreement. The subject closedown agreement was duly executed December 15, 1971, by Local 409, the UAW and Fedders.

Certain provisions of the pension plan agreement are critical to the determination of the subject matter of this litigation—the closedown agreement.

Article XII of the pension plan agreement provides:

> "Amendment and Duration of the Plan. 12.01 The Plan may be modified, altered or amended upon mutual agreement of the Company and the Union."

Under Section 12.03, the pension plan agreement was to remain in full force and effect until March 1, 1973, when it would be proper subject matter for the next collective bargaining negotiations.

Article V, Section 5.01 of the closedown agreement amended the terms of Section 9.01 of the pension plan agreement, as follows:

> "9.01 The Company will contribute not later than February 15, 1972, $160,000 to the Trust Fund, and upon payment of such amount, the Company shall have no further funding obligation under the Plan."

Fedders paid the $160,000 into the Trust Fund and considered its obligation under the pension plan fully satisfied. The defendant Unions agreed.

The closedown agreement did *not* alter the plan provisions governing benefits or allocation of the fund on termination:

> . . . Fedders and the defendant Unions in no way modified the provisions of Section 13.01 of

the pension plan, which section defines how funds in the Trust Fund of the plan should be allocated upon termination of the plan. The benefit provisions of the pension plan were not altered. The $160,000 additional contribution to the Trust Fund by Fedders was allocated in accordance with the preexisting allocation formula.

The Company was not delinquent in its pension contributions.[3] Despite the new $160,000, the assets in the

[3] There are two elements to an employer's annual contribution to a funded pension plan: normal cost, and a part of accrued (or "past-service") liability.

"Normal cost" is the amount of money which, according to an actuary, will fund the benefits due on retirement for work done for the employer in the last year.

"Past service liability" arises because, when a pension plan is started, employees are given credit for all their service with the employer, not just the years since the pension plan started. E.g., if a plan starts in 1950, an employee with 20 years of service may retire in 1951. Only one year (1950) of normal cost will be paid by 1951. Some 19 years of "past-service" remain to be funded. This "past service liability" is funded, *assuming* continuation of the plan, by amortizing it over a 30 year funding cycle. Such was the case here. The yearly contribution to the amortization of the past service liability (plus interest) is the second part of an employer's annual pension contribution.

However, an employer may go out of business before the 30 year amortization cycle has been completed. This happened here. What it does, the plan is not fully funded. Whatever money is in the fund is distributed to the beneficiaries in a priority order set out in the termination section of the plan, here Art. XIII § 13.01. Depending on the assets and actuarial calculations, the lower categories suffer benefit cuts—even though the employer has paid every cent, every year, under the pension plan agreement.

This result led Congress to pass the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC § 1001 *et seq.* That law establishes the Pension Benefit Guaranty Corporation (PBGC) to reinsure pension benefits in the event of closings, 29 USC §§ 1301-1368, much as FDIC reinsures bank deposits. Unfortunately, the instant closing occurred before the effective date of ERISA, 29 USC § 1381.

fund were insufficient to provide full benefits for those in the lowest distribution priorities, including plaintiffs.

Plaintiffs sued, demanding that the Company fully fund the plan to the end of its 30 year funding cycle, *regardless* of the plant closing or the term of the pension plan agreement. The UAW, it is alleged breached its duty of fair representation in failing to bargain such future funding.

The Seventh Circuit affirmed the District Court's grant of summary judgment to defendants, holding: No vested property rights were infringed. As to funds previously contributed, the plan's existing allocation formula was followed: *Contrast: Hauser* v. *Farwell, Ozmun, Kirk & Co.*, 299 F. Supp. 387 (D Minn. 1969). The closedown agreement affected only *future* contributions, an area where the Unions have complete and sole authority to negotiate. § 9(a) of the National Labor Relations Act (NLRA), 29 USC § 159(a). There is no estoppel. The Union cannot be blamed for failing to secure a contract right which plaintiffs never had. And finally, plaintiffs failed to show "arbitrary, discriminatory, or bad faith conduct" by the UAW. *Vaca* v. *Sipes,* 386 U.S. 171, 190 (1967); *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 299 (1971).

ARGUMENT

This case is, at best, of parochial concern, turning on the reading of a particular labor contract. Everyone concedes the employees had vested rights in funds previously contributed to the pension plan. The Union did not bargain away these rights. The employees received exactly the allocation of funds specified in the

plan. As to future contributions, Article XII allowed modification and amendment. The Union made the best deal it could, in difficult circumstances, obtaining an additional $160,000 for the plan.[4] Petitioners argue only that Article XII did not allow this, or, if it did, the UAW did not get enough. Issues of such small significance do not merit review.

Were there significant issues, review would be inappropriate for another reason. Since this plant closed, Congress enacted the Employee Retirement Income Security Act (ERISA) of 1974, 29 USC § 1001, *et seq*. Had this plant closed today, the Pension Benefit Guaranty Corporation (PBGC), a federal agency, would have insured the pension benefits under Title IV of ERISA, 29 USC § 1332. The issues in this case are of passing, rather than continuing interest.

The Seventh Circuit's decision rests on the construction of a single labor contract. Because of ERISA, similar problems are unlikely to occur again. There are no constitutional or statutory issues. Petitioners

[4] Petitioners cite *UAW* v. *H.K. Porter Co.*, —— F. Supp. —— (ED Mich. 1976), 93 LRRM 2917, *app. pndg.*, accusing the UAW of being disingenuous. In *H.K. Porter*, the Company contracted to " . . . provide for the pension under the Plan by funding the Plan with the . . . Trust." [§ 10, Funding, reprinted in App. 130] The UAW viewed this as an unrestricted promise to pay for the benefits and sued to enforce it. The District Court agreed. The Fedders plan, in contrast, contains the usual and—from the Company's view—more prudent language. Section 9.01 requires only yearly payments of normal cost, and past service funding on a 30 year schedule. Fedders made these yearly payments. There was no unrestricted promise, as in *H.K. Porter*. The moral of these two cases is simple. When a Company makes an unrestricted promise, the UAW will sue to enforce it. Where, as here, there is no such promise, the UAW does not bring meritless litigation. Instead, it bargains as best it can.

do not assert any conflict among the Circuits. Nor is there a conflict with the decisions of this Court.[5] Petitioners can suggest no real reason why this case merits review.

CONCLUSION

For the foregoing reasons, the Court should *deny* the Petition.

Respectfully submitted,

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February 28, 1977.

[5] In order to have a conflict with *Burley* v. *Elgin, J & E Ry. Co.*, 327 U.S. 661 (1946), petitioners must *first* have their vested rights infringed. Holding that, under the agreement, no vested rights were infringed, the Court below did not even reach *Burley*. The Seventh Circuit, with all the parties, concedes the holding in *Burley*—that a union cannot bargain away vested rights. 544 F. 2d at 310.